

## Condominium Class Actions

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## CONDOMINIUM CLASS ACTIONS

Modern urban development, characterized by high-rise, high-density living, large and remote corporate and governmental institutions, and mass-produced, mass-consumed goods, has thrust those within its grasp into common legal and factual situations.<sup>1</sup> It is, therefore, not surprising that, in recent years, much attention has been focused on the concept of the class or representative action, a device which permits representatives of a group to bring suit to enforce the rights of all. Although much class litigation has involved other interests,<sup>2</sup> nowhere is the utilization of the class action device more appropriate than in the condominium field. Since unit owners not only live in close proximity to each other, but also share an undivided interest in the common elements of their condominium, an effective group remedy must be available to insure that their legal rights do not go unprotected.

An action is maintainable in a given case only when the plaintiffs have standing to sue. Standing requires that the complaining party have such a personal stake in the outcome of the controversy as to entitle him to seek relief in court.<sup>3</sup> It has been said that standing constitutes an "access barrier" above which the plaintiff must rise in order to obtain court review of his complaint.<sup>4</sup> In a group condominium action, the first inquiry deals with the type of rights asserted and whether they are amenable to group remedy. The next concern is whether the class representative has a sufficient stake in the controversy to pass over the standing barrier.<sup>5</sup>

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<sup>1</sup> 18 N.Y. JUD. COUNCIL REP. 217, 221-22 (1952); J. WEINSTEIN, H. KORN & A. MILLER, NEW YORK CIVIL PRACTICE ¶ 1005.01 (1973) [hereinafter cited as WEINSTEIN, KORN & MILLER].

<sup>2</sup> See, e.g., *Korn v. Franchard Corp.*, 456 F.2d 1206 (2d Cir. 1972) (investors); *Cypress v. New York News Gen. and Nonsectarian Hosp. Ass'n*, 375 F.2d 648 (4th Cir. 1967) (en banc) (discrimination against black physicians); *City-Wide Coalition Against Childhood Lead Paint Poisoning v. Philadelphia Housing Authority*, 356 F. Supp. 123 (E.D. Pa. 1973) (indigent tenants); *Vasquez v. Superior Court*, 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971) (en banc) (consumers).

<sup>3</sup> *Sierra Club v. Morton*, 405 U.S. 727, 731-32 (1972); *Flast v. Cohen*, 392 U.S. 83, 99 (1968); *Baker v. Carr*, 369 U.S. 186, 204 (1962).

[W]hen standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue . . . .

*Flast v. Cohen*, 392 U.S. 83, 99-100 (1968).

<sup>4</sup> Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim of Relief*, 83 YALE L.J. 425, 427 (1974).

The issue of standing goes only to the right of the party to obtain review and not to the question of whether he is entitled to relief. *Id.* As former Chief Justice Warren has stated, standing "focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Flast v. Cohen*, 392 U.S. 83, 99 (1968).

<sup>5</sup> Before embarking upon a treatment of standing, it is appropriate to refer to a state-

## STATE CLASS ACTIONS

The class action is designed to avoid a multiplicity of suits and the related possibility of contradictory adjudications of the same legal or factual issues and reduce expenses to both the state and the litigants. It also provides economic, psychological and procedural advantages to the class.<sup>6</sup> However, many courts have been reluctant to allow use of the device because it may deprive an injured party of the right to elect his remedies,<sup>7</sup> bind absent parties to a class judgment,<sup>8</sup> and give malcontents an "instrument of harassment."<sup>9</sup>

Class actions spawned by condominiums have arisen in several contexts. Controversies amenable to class action include those over building conversions, defective construction and carrying charges. Parties bringing class actions must demonstrate that the balance of conflicting values tilts in favor of allowing their suits to be maintained.<sup>10</sup> New York permits class actions to be maintained in either of two instances: 1) where the question concerns a common or general interest of many persons or 2) where the potential parties are numerous and joinder would be impracticable.<sup>11</sup>

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ment by Mr. Justice Douglas that "generalizations about standing to sue are largely worthless as such." *Association of Data Processing Organizations v. Camp*, 397 U.S. 150, 151 (1970).

<sup>6</sup> 18 N.Y. JUD. COUNCIL REP. 217, 221 (1952); WEINSTEIN, KORN & MILLER, *supra* note 1, at ¶ 1005.06.

<sup>7</sup> *Summers v. Wyman*, 64 Misc. 2d 67, 71, 314 N.Y.S.2d 430, 434 (Sup. Ct. Nassau County 1970); 18 N.Y. JUD. COUNCIL REP. 217, 231 (1952); WEINSTEIN, KORN & MILLER, *supra* note 1, at ¶ 1005.01. See *Brenner v. Title Guar. & Trust Co.*, 276 N.Y. 230, 233, 11 N.E.2d 890, 891 (1937); *Bennett v. Straw*, 28 Misc. 2d 914, 915, 220 N.Y.S.2d 806, 807-08 (Sup. Ct. Nassau County 1961).

<sup>8</sup> 18 N.Y. JUD. COUNCIL REP. 217, 221, 227 (1952); WEINSTEIN, KORN & MILLER, *supra* note 1, at ¶ 1005.01.

<sup>9</sup> *Hall v. Coburn Corp.*, 26 N.Y.2d 396, 404, 259 N.E.2d 720, 723, 311 N.Y.S.2d 281, 285-86 (1970); see *Adler v. Bonner Realty & Constr. Co.*, 62 Misc. 2d 710, 713, 309 N.Y.S.2d 404, 407 (Sup. Ct. Bronx County 1970); WEINSTEIN, KORN & MILLER, *supra* note 1, at ¶ 1005.11.

<sup>10</sup> See *In re Cisco v. Lavine*, 72 Misc. 2d 1009, 1012-13, 340 N.Y.S.2d 275, 279 (Sup. Ct. Nassau County), *modified*, 72 Misc. 2d 1087, 341 N.Y.S.2d 719 (Sup. Ct. Nassau County 1973); WEINSTEIN, KORN & MILLER, *supra* note 1, at ¶ 1005.05.

<sup>11</sup> N.Y. CIV. PRAC. § 1005(a) (McKinney 1963). The word "or" "has been construed disjunctively thus eliminating the requirement of impracticality of joinder when a question of common or general interest is involved." 18 N.Y. JUD. COUNCIL REP. 217, 224 (1952). However, the New York Court of Appeals has never considered this question. See N.Y. CIV. PRAC. § 1005, legislative studies at 306 (McKinney 1963). See also CAL. CODE CIV. P. § 382 (West 1973); *Bowles v. Superior Court*, 44 Cal. 2d 574, 283 P.2d 704, 712 (1955) (en banc), wherein the California class action statute was also construed in the disjunctive.

In applying the statute, the New York courts have adopted a conservative approach. The "tendency . . . is to restrict, rather than enlarge, the scope of class action." *Hall v. Coburn Corp.*, 26 N.Y.2d 396, 402, 259 N.E.2d 720, 722, 311 N.Y.S.2d 281, 284 (1970).

Under both New York State's and New York City's rent control regulations, a rent-controlled (statutory) tenant may be evicted from his apartment by the purchaser of stock in a cooperative if 35 percent of the tenants in occupancy purchased stock in the cooperative in good faith and in the absence of fraud, duress, or any discriminatory repurchase agreement or inducement.<sup>12</sup> New York City's regulations extend the 35 percent requirement to condominium conversions.<sup>13</sup> Whether a tenant or class of tenants has standing to challenge the conversion depends upon whether or not their apartments are subject to rent regulation.<sup>14</sup> It is well established law that, because of the threat of eviction, nonpurchasing statutory tenants have standing to bring a class action for a declaratory judgment against the validity of the cooperative plan.<sup>15</sup> Purchasing tenants, however, could not bring a class action for fraud in the sale even though the fraud may have been committed pursuant to a common plan. Because of the individual nature of fraud actions, New York courts have refused to permit representative actions grounded in fraud or deceit.<sup>16</sup>

<sup>12</sup> N.Y. ST. RENT & EVICTION R. § 55(3)(c)(i) (McKinney 1974); N.Y. CITY RENT & EVICTION R. § 55(c)(3)(a) (McKinney 1974). In a recent development, New York enacted legislation granting tenants in occupancy a greater degree of protection. An amendment to General Business Law § 352-e requires condominium offering plans to include a provision that 35% of the tenants must consent to purchase under the plan before the plan can take effect. N.Y. SESS. LAWS [1974], ch. 1021, § 2-a(1)(i) (McKinney). For a more detailed treatment of conversion requirements, see Note, *Tenant Protection in Condominium Conversions*, *supra*.

<sup>13</sup> N.Y. CITY RENT & EVICTION R. § 55(f)(3)(c) (McKinney 1974).

<sup>14</sup> Recently enacted legislation requires that 35% of the tenants in occupancy consent to purchase units pursuant to the conversion plan before the plan can go into effect. See note 12 *supra*. Since unit owners are entitled to base their decision to purchase on a complete and proper plan, they should have standing to challenge the means by which the 35% were induced to give their consent. However, *Whalen v. Lefkowitz*, 44 App. Div. 2d 442, 445, 355 N.Y.S.2d 592, 594-95 (1st Dep't 1974), apparently precludes the maintenance of such an action.

<sup>15</sup> *Gilligan v. Tishman Realty & Constr. Co.*, 283 App. Div. 157, 126 N.Y.S.2d 813 (1st Dep't 1953), *aff'd*, 306 N.Y. 974, 120 N.E.2d 230 (1954) (mem.); *Schumann v. 250 Tenants Corp.*, 65 Misc. 2d 253, 317 N.Y.S.2d 500 (Sup. Ct. N.Y. County 1970); *Pensic v. Sulzberger* (Sup. Ct. N.Y. County), in 164 N.Y.L.J. 11, July 16, 1970, at 2, col. 2. See *Judson v. Frankel*, 279 App. Div. 372, 110 N.Y.S.2d 156 (1st Dep't 1952) (individual tenant and tenant "protective committee" held to have standing).

<sup>16</sup> *Tuvim v. 10 East 30 Corp.*, 32 N.Y.2d 541, 545, 300 N.E.2d 397, 398, 347 N.Y.S.2d 13, 14-15 (1973); *Richards v. Kaskel*, 32 N.Y.2d 524, 536 n.6, 300 N.E.2d 388, 393 n.6, 347 N.Y.S.2d 1, 9 n.6 (1973); *Society Milion Athena v. National Bank of Greece*, 281 N.Y. 282, 22 N.E.2d 374 (1939); *Brenner v. Title Guar. & Trust Co.*, 276 N.Y. 230, 11 N.E.2d 890 (1937); *Greeley v. Rockaway Point Development Corp.*, 15 App. Div. 2d 528, 223 N.Y.S.2d 84 (2d Dep't 1966) (mem.).

In *Society Milion*, Chief Judge Lehman stated: "Separate wrongs to separate persons, though committed by similar means and even pursuant to a single plan, do not alone create a common or general interest in those who are wronged." 281 N.Y. at 292, 22 N.E.2d at 377. Each plaintiff must be able to make his own choice of remedies and the defendants may have defenses available against some plaintiffs that are not available

Under the New York City Administrative Code, any landlord subject to the real estate industry stabilization code may not refuse to renew a lease by virtue of a conversion of a rent-stabilized building unless he obtains purchase agreements from 35 percent of the tenants.<sup>17</sup> In a recent case, the New York Court of Appeals held that these rent-stabilized tenants, who otherwise would be entitled to renewal leases, have standing to bring a class action for declaratory relief.<sup>18</sup> Nonpurchasing tenants, not subject to any form of rent regulation, would not have standing to maintain any action, class or otherwise.<sup>19</sup>

### Conversions

A valid offering plan must be filed with the Attorney General of New York before any public offering of an interest in a real estate investment can be made.<sup>20</sup> In *Grenader v. Lefkowitz*,<sup>21</sup> a New York trial court held that nonpurchasing tenants in occupancy, whether

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against others. *Id.* Additionally, the degree of reliance on the misrepresentation may vary from plaintiff to plaintiff. See *Coolidge v. Kaskel* (Sup. Ct. N.Y. County), in 150 N.Y.L.J. 14, July 19, 1963, at 5, col. 7, *aff'd*, 19 App. Div. 2d 947, 245 N.Y.S.2d 350 (1st Dep't 1963) (mem.), *aff'd*, 16 N.Y.2d 559, 208 N.E.2d 780, 260 N.Y.S.2d 835 (1965) (mem.).

Of course, purchasing tenants, whether rent-controlled or not, would have standing to bring individual actions for fraud. See *Adler v. Bonner Realty & Constr. Co.*, 62 Misc. 2d 710, 713-14, 309 N.Y.S.2d 404, 407-08 (Sup. Ct. Bronx County 1970).

<sup>17</sup> N.Y.C. ADMIN. CODE § YY51-6.0(c)(9)(a) (McKinney 1974).

<sup>18</sup> *Richards v. Kaskel*, 32 N.Y.2d 524, 300 N.E.2d 388, 347 N.Y.S.2d 1 (1973). Chief Judge Fuld held that there was no bar to a class action:

The plaintiffs and the other tenants on whose behalf they instituted suit would be ousted from possession were it held that the building was lawfully and properly co-operated. . . . The present case undoubtedly involves a question of common interest affecting the rights of every non-purchasing tenant in the building.

*Id.* at 535, 300 N.E.2d at 393, 347 N.Y.S.2d at 8.

<sup>19</sup> *Cf. Ortega v. Lefkowitz*, 66 Misc. 2d 438, 440, 321 N.Y.S.2d 17, 19 (Sup. Ct. N.Y. County 1971). The plaintiffs' rights are not affected because "at most a change of ownership of the building is involved and tenants are granted no rights by statute or otherwise to interfere therewith." *Id.*

No fraud action would lie because the nonpurchasing tenants necessarily did not purchase an apartment in reliance on the misrepresentations alleged. *But see Pensic v. Sulzberger* (Sup. Ct. N.Y. County), in 164 N.Y.L.J. 11, July 16, 1970, at 2, col. 2.

<sup>20</sup> N.Y. GEN. BUS. L. § 352(e) (McKinney Supp. 1974).

The technical sufficiency of the offering plan must first be determined by the Attorney General, with his decision subject to Article 78 review by the courts, pursuant to N.Y. CIV. PRAC. § 7801 *et seq.* (McKinney 1968); 1045 Tenants Ass'n v. Attorney General, 73 Misc. 2d 600, 342 N.Y.S.2d 769 (Sup. Ct. N.Y. County 1973); *Schumann v. 250 Tenants Corp.*, 65 Misc. 2d 253, 317 N.Y.S.2d 500 (Sup. Ct. N.Y. County 1970).

However, the requirement that the Attorney General make the initial determination as to alleged deficiencies in the offering plan extends only to those defects that would not be actionable but for the filing requirement. *Schumann v. 250 Tenants Corp.*, 65 Misc. 2d 253, 256, 317 N.Y.S.2d 500, 504-05 (Sup. Ct. N.Y. County 1970). Even though the Attorney General is required by statute to review the prospectus, "th[e] court retains its inherent jurisdiction in law and equity to deal with allegations of fraud, deceit, misrepresentation and breach of fiduciary obligations, irrespective of the statutory requirements." *Id.* at 257, 317 N.Y.S.2d at 505.

<sup>21</sup> 71 Misc. 2d 414, 416, 336 N.Y.S.2d 355, 356 (Sup. Ct. N.Y. County 1972).

subject to rent control or not, have standing to maintain a special proceeding<sup>22</sup> to annul the Attorney General's decision to accept for filing the offering plan of a proposed cooperative corporation. The court recognized that, given a severe housing shortage, such a decision has "far-reaching" consequences and may result in an alteration of the tenant's quality of life.<sup>23</sup> Thus, there was a sufficient common interest to allow the nonpurchasing parties to demand that an offering plan be free from defects or illegality.

Unfortunately, the holding in *Grenader* was impliedly rejected by the Appellate Division, First Department, in *Whalen v. Lefkowitz*,<sup>24</sup> one of two recent cases stemming from a much publicized condominium conversion controversy. The tenants in the North Quadrant of the Parkchester development in Bronx County, New York, brought two class actions in an attempt to block the proposed conversion. In *Whalen*, the Appellate Division reversed a lower court order which had held that a class action could be maintained, in the context of a special proceeding, on behalf of all the tenants in the buildings subject to conversion.<sup>25</sup> All tenants in the North Quadrant, whether subject to rent controls or not, were given the exclusive right to purchase their own apartments. The trial court had ruled that all the tenants were thus entitled to a complete and proper offering plan on which to base their decision to purchase. If the plan were defective as alleged, a class action would lie since "all the tenants were injured in the same manner as they were compelled to make their decision based on a deficient plan."<sup>26</sup>

The Appellate Division held that a class action on behalf of all the tenants could not be maintained, since the rights of the tenants would depend upon whether their apartments were rent controlled. It rejected as "fallacious" a test based upon the effect a decision to purchase would have on the occupant's way of life. The court stated that a tenant in occupancy, contemplating purchasing his apartment, could not stand in a better legal position than an outsider who is considering buying into the building. Unless a tenant's right to continued occupancy of his apartment is affected by the proposed conversion, he has no right to prevent others from buying condominium units.<sup>27</sup> If a

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<sup>22</sup> N.Y. CIV. PRAC. § 7801 *et seq.* (McKinney 1968).

<sup>23</sup> 71 Misc. 2d at 414, 336 N.Y.S.2d at 356.

<sup>24</sup> 44 App. Div. 2d 442, 355 N.Y.S.2d 592 (1st Dep't 1974), *rev'g* 170 N.Y.L.J. 55, Sept. 18, 1973, at 19, col. 4 (Sup. Ct. Bronx County).

<sup>25</sup> See note 22 and accompanying text *supra*.

<sup>26</sup> 170 N.Y.L.J. 55, at 19, col. 5.

<sup>27</sup> 44 App. Div. 2d at 444, 355 N.Y.S.2d at 594-95.

purchase is made based upon a deficient or misleading plan, the complaining unit owner's remedy would be an action for fraud.<sup>28</sup>

In the related case of *Whalen v. Parkchester Apartments*,<sup>29</sup> an action was brought against the sponsors by plaintiffs representing four different classes of tenants: purchasing tenants subject to rent control, a purchasing tenant not subject to rent control, a nonpurchasing tenant subject to rent control, and a nonpurchasing tenant not subject to rent control. The plaintiffs sought a declaratory judgment against the validity of the offering plan. The trial court indicated that none of the four classes of tenants would have standing to maintain such an action. The sponsors of the project had agreed to forego eviction of the statutory tenants, except for non-payment of rent or other default. The statutory tenants had no fear of eviction and the non-rent controlled, nonpurchasing tenants, as in the cases relating to cooperatives,<sup>30</sup> had no interest at all. Since only the ownership of the underlying fee was being altered without affecting the possessory interests of the plaintiffs, there was no basis for standing.<sup>31</sup>

The result of the two *Whalen* decisions is that nonpurchasing tenants who are not subject to eviction will be foreclosed from bringing either a special proceeding against the Attorney General or a declaratory judgment action against the sponsor of the conversion. Inasmuch as tenants cannot contest the validity of the plan prior to purchase, they must either purchase under the plan or start looking for another place to live.<sup>32</sup> Although a defrauded purchaser could

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<sup>28</sup> Each unit owner would have to commence his own action because New York does not recognize class actions for fraud. See note 16 and accompanying text *supra*.

<sup>29</sup> 170 N.Y.L.J. 55, Sept. 18, 1973, at 19, col. 6 (Sup. Ct. Bronx County).

<sup>30</sup> See note 15 and accompanying text *supra*.

<sup>31</sup> 170 N.Y.L.J. 55, at 19, col. 8. See *Whalen v. Lefkowitz*, 44 App. Div. 2d 442, 444, 355 N.Y.S.2d 592, 594-95 (1st Dep't 1974); *Ortega v. Lefkowitz*, 66 Misc. 2d 438, 440, 321 N.Y.S.2d 17, 19 (Sup. Ct. N.Y. County 1971).

In *Whalen v. Parkchester Apartments*, although the trial court indicated that the plaintiffs did not have standing to maintain their action, it expressly refused to dismiss the action on that basis. Instead, it dismissed on the ground that the plaintiffs had failed to prove that any triable issues of fact existed on the allegations of misrepresentation and misconduct.

The situation is further compounded by the fact that the New York legislature recently enacted legislation imposing a two-year moratorium on evictions from converted buildings. N.Y. Sess. LAWS [1974], ch. 1021, § 2-a(1)(iii) (McKinney). Since tenants would be under no immediate threat of eviction, they may lack standing to sue.

<sup>32</sup> In *Pensic v. Sulzberger* (Sup. Ct. N.Y. County), in 164 N.Y.L.J. 11, July 16, 1970, at 2, col. 2, the court commented that:

[t]o require . . . a purchase prior to complaint as to defects in the [p]lan would pose tenants . . . with a most precarious decision: truly a "Hobson's choice." It seems clear as both a matter of the intent of the applicable legislation and of the logic that the tenants are persons most interested in this matter and to be protected by the requirement that a [p]lan be filed and promulgated.

maintain an action for misrepresentation, the expenses inherent in litigation may discourage instituting suit. Since class actions based on deceit cannot be maintained, there is no effective group remedy. The problem is compounded in Parkchester-type developments where thousands of tenants could be seriously affected by a single plan.

As the New York courts have severely restricted the use of class actions, legislation should be enacted in that state to permit tenants to bring class actions and challenge the validity of offering plans.

### *Breach of Warranty*

Different considerations are present when the unit owners attempt to bring a class action against the sponsor and/or builder of the condominium project for damages for defective workmanship.

In the Florida case of *Gable v. Silver*,<sup>33</sup> purchasers of new condominium units sued a developer over defective air conditioning, basing their cause of action on breach of an implied warranty of merchantability and fitness.<sup>34</sup> In *Edenfield v. Woodlawn Manor, Inc.*,<sup>35</sup> which arose in Tennessee, a single purchaser claimed a breach of contract in that the air conditioning was not installed in the manner specified in the purchase agreement. In both cases, the plaintiffs were allowed to collect the cost of correcting the defects. In an Illinois case,<sup>36</sup> 51 purchasers of condominium units successfully sued (in a nonclass action) a builder for breach of contract, alleging that he failed to construct the project in accordance with the architect's plan.

Although these three cases did not involve representative suits, class actions would be appropriate in such situations if there are a substantial number of aggrieved parties. It is the unit owners who sustain damages caused by defective construction,<sup>37</sup> and must collectively bear

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<sup>33</sup> 258 So. 2d 11 (Fla. Dist. Ct. App.), *cert. dismissed*, 264 So. 2d 418 (Fla. 1972) (*per curiam*).

<sup>34</sup> *Cf. Mcase v. Fox*, 200 N.W.2d 791, 796 (Iowa 1972), where the court recognized the existence of at least a limited implied warranty of habitability (running against latent defects and material housing code violations) in the leasing of homes, condominiums and apartments.

<sup>35</sup> 62 Tenn. App. 280, 462 S.W.2d 237 (Ct. App. 1970), *cert. denied*, 462 S.W.2d 237 (Tenn. 1971).

<sup>36</sup> *Franzen v. Dunbar Builders Corp.*, 132 Ill. App. 2d 586, 270 N.E.2d 118 (App. Ct. 1971). All but nine of the purchase contracts specifically provided that the work was to be done in accordance with the plan. Forty-two contracts referred to a numbered architect's plan. Of the other nine, one was apparently misnumbered, seven gave the name of the proposed project and not the plan number, and the blank on one contract was not filled in. The plaintiffs were allowed to recover, although some items were not allowed because of evidentiary errors committed at the trial; these matters were remanded for a new trial.

<sup>37</sup> *See Friendly Village Community Ass'n, Inc., No. IV. v. Silva & Hill Constr. Co.*, 31 Cal. App. 3d 220, 107 Cal. Rptr. 123, 126 (1973).



the cost of repairing defects through increased assessments. Additionally, the market value of their units is reduced and their living comfort and convenience impaired.<sup>38</sup> When unit owners have all signed similar contracts, and a defect is common to all units, there is a sufficient common interest to warrant maintenance of a class action.<sup>39</sup> The greater the number of units in the condominium, the more vital the need for the class action will be.<sup>40</sup>

### *Sweetheart Contracts*

Class actions could also be utilized in situations where unit owners seek rescission of their long-term, "sweetheart" contracts with a developer.<sup>41</sup> In states where a condominium association is not permitted to sue on behalf of unit owners,<sup>42</sup> it is essential that class actions be allowed in order to prevent unscrupulous developers from building traps for large numbers of unwary purchasers.<sup>43</sup>

### *Assessments*

An area that should prove to be a tinderbox for litigation concerns the amount of carrying charges that unit owners will be assessed for the cost of maintaining the common elements of their building. Unless state court jurisdiction is precluded by federal intervention,<sup>44</sup> unit owners should be entitled to bring class actions to contest the amounts

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<sup>38</sup> See *Edenfield v. Woodlawn Manor, Inc.*, 62 Tenn. App. 280, 462 S.W.2d 237 (Ct. App. 1970), *cert. denied*, 462 S.W.2d 237, 241-42 (Tenn. 1971). The court noted that "consideration for comfort and convenience is one of major importance in a building constructed as a dwelling place for the owner."

<sup>39</sup> A class action can be maintained when there is a uniform factual situation and only one available remedy. *Cirillo v. Board of Educ.*, 66 Misc. 2d 749, 751, 321 N.Y.S.2d 952, 954 (Sup. Ct. Niagara County 1971). *But see In re Maslinoff v. Central School Dist. No. 1*, 67 Misc. 2d 149, 323 N.Y.S.2d 1005 (Sup. Ct. Dutchess County 1971).

<sup>40</sup> See WEINSTEIN, KORN & MILLER, *supra* note 1, at ¶ 1005.11: "Permitting class actions provides an economical means of handling disputes in large housing developments." However, in apartment house leases, class actions for breach of contract have not been maintainable where all the leases are not identical. *Jacobson v. Shore Road Gardens, Inc.*, 17 App. Div. 2d 952, 953, 233 N.Y.S.2d 782, 783 (2d Dep't 1962) (mem.).

<sup>41</sup> In *Wechsler v. Goldman*, 214 So. 2d 741 (Fla. Dist. Ct. App. 1968) (per curiam), each of the unit owners signed the same 99-year lease of an adjacent recreational area owned by the developer. The court held that the unit owners could not be relieved of their obligations under the lease because they had knowledge of the lease at the time they purchased their units and expressly accepted the lease. The condominium associations, while under control of the sponsor, also signed the lease. The court ruled that the associations could not now attack the lease provisions. *Id.* at 744.

<sup>42</sup> See notes 75-77 and accompanying text *infra*.

<sup>43</sup> By allowing for greater flexibility in class action requirements, courts could provide immediate relief to purchasers damaged by unfair dealings with developers. This would obviate the need for additional legislation. *But see Wechsler v. Goldman*, 214 So. 2d 741, 744 (Fla. Dist. Ct. App. 1968).

<sup>44</sup> See *Rubel v. Linden Towers Corp. No. 6, Inc.*, 39 Misc. 2d 620, 241 N.Y.S.2d 779 (Sup. Ct. Queens County 1963) and text accompanying note 51 *infra*.

of carrying charges set by their board of managers. Since the cost of maintenance must be met by assessment, a reduction or increase in the assessment of one or more units will necessarily affect the carrying charges paid by other unit owners. In order to prevent an endless chain of litigation, class actions should be permitted.<sup>45</sup> That different units may be responsible for different percentage shares of the overall assessment should not preclude a class action.<sup>46</sup>

### *Enforcement of Bylaws*

Another area susceptible to class actions by unit owners concerns the bylaws of the condominium association. In the New York case of *Alpern v. Goldsmith*,<sup>47</sup> the Supreme Court, Nassau County, permitted a class action to compel a board of managers to enforce bylaws. The reasoning which permitted this action may be extended to allow unit owners to challenge rules and regulations enacted by the board of managers. Inasmuch as all the unit owners must comply with the bylaws, there is a sufficient common interest to allow the maintenance of class actions challenging their validity.

### FEDERAL CLASS ACTIONS

The National Housing Act authorizes the Secretary of Housing and Urban Development (HUD) to insure blanket mortgages on condominiums.<sup>48</sup> The Secretary is required to regulate or restrict "rents, charges, capital structure, rate of return, and methods of operation" of projects with mortgages that are insured.<sup>49</sup> Federal Housing Administration (FHA) regulations issued pursuant to the statute require that, "the mortgagor shall not permit occupancy except in accordance with a schedule of charges and under an occupancy agreement or lease approved by the Commissioner."<sup>50</sup>

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<sup>45</sup> Two states have enacted statutes authorizing the governing body of the condominium to appeal tax assessments on behalf of all the unit owners. CONN. GEN. STAT. § 47-89 (1973); 30 ILL. STAT. ANN. § 312 (Supp. 1973).

<sup>46</sup> See WEINSTEIN, KORN & MILLER, *supra* note 1, at ¶ 1005.12 ("that each member of the class might be entitled to different sums is, in itself, no basis for denying the class action").

<sup>47</sup> 166 N.Y.L.J. 86, Nov. 4, 1971, at 18, col. 5 (Sup. Ct. Nassau County).

<sup>48</sup> 12 U.S.C. § 1715y (1970).

<sup>49</sup> *Id.* § 1715y(d)(2).

<sup>50</sup> 24 C.F.R. § 213.29 (1973).

In 1965, the FHA was absorbed by the newly-created Department of Health, Education, and Welfare. Department of Housing and Urban Development Act, Pub. L. No. 89-174, § 5(a), 79 Stat. 667 (1965). Two years later, the National Housing Act was amended in order to reflect the transfer of FHA functions to HUD. Act of May 25, 1967, Pub. L. No. 90-19, § 1, 81 Stat. 17 *amending* scattered sections of 12, 42 U.S.C.

In *Rubel v. Linden Towers Coop. No. 6, Inc.*,<sup>51</sup> the New York Supreme Court, Queens County, held that state courts do not have jurisdiction to review a schedule of carrying charges which the FHA has approved. Since state court consideration is precluded, the unit owners will not be able to challenge oppressive carrying charges unless the federal courts take cognizance of their action.

Section 10(a) of the Administrative Procedure Act (APA) provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute is entitled to judicial review thereof."<sup>52</sup> In addition, the National Housing Act itself authorizes the Secretary of Housing and Urban Development to sue or be sued in any court of competent jurisdiction, state or federal.<sup>53</sup>

In *Choy v. Farragut Gardens I, Inc.*,<sup>54</sup> a federal district court dismissed a class action brought on behalf of tenants of five apartment houses.<sup>55</sup> The plaintiffs contended that FHA-approved rents were excessive. The court noted that the FHA action was specifically committed by statute to the agency's discretion,<sup>56</sup> and that the section of the National Housing Act involved was specifically excluded from the APA.<sup>57</sup> The court ruled that the statute authorizing the Secretary of Housing and Urban Development to sue or be sued constituted only a waiver of sovereign immunity and could not serve as an independent predicate for jurisdiction.<sup>58</sup>

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<sup>51</sup> 39 Misc. 2d 620, 241 N.Y.S.2d 779 (Sup. Ct. Queens County 1963). The court ruled that it lacked jurisdiction because any grant of relief to the plaintiffs would necessarily involve revising FHA-approved charges. Since the FHA was acting under authority delegated to it by Congress, a revision ordered by a state court would constitute an improper assertion of state control over a federal agency. *Id.* at 626, 241 N.Y.S.2d at 785, citing *Fieger v. Glen Oaks Village*, 309 N.Y. 527, 132 N.E.2d 492 (1956).

In *Rubel*, the litigation arose because the board of managers of a cooperative corporation, which owned two buildings, reduced the carrying charges on apartments in the building in which they lived while maintaining a higher level of charges for tenants in the other one.

<sup>52</sup> 5 U.S.C. § 702 (1970).

<sup>53</sup> 12 U.S.C. § 1702 (1970).

<sup>54</sup> 131 F. Supp. 609 (S.D.N.Y. 1955).

<sup>55</sup> *Accord*, *Gant v. Cole*, 166 F. Supp. 129 (S.D.N.Y. 1958), *aff'd*, 263 F.2d 244 (2d Cir), *cert. denied*, 359 U.S. 978 (1959); *James River Apartments v. Federal Housing Administration*, 136 F. Supp. 24, 29 (D. Md. 1955).

<sup>56</sup> 12 U.S.C. § 1743(b)(1) (1970). The mortgage insurance was issued under the National War Housing Insurance section of the National Housing Act. Condominium mortgage insurance comes under a different subchapter, and does not specifically commit regulation of charges to FHA discretion. *See id.* § 1715y(d)(2).

<sup>57</sup> Section 1743 is beyond the reach of the APA, but section 1715y, the condominium section, is not. *See* 5 U.S.C. § 701 (1970).

<sup>58</sup> 131 F. Supp. at 613.

However, in decisions handed down subsequent to *Choy*, the Supreme Court ruled that section 10 of the APA authorizes court review of federal agency action where plaintiffs allege

that the challenged action ha[s] caused them 'injury in fact,' and where the alleged injury [is] to an interest 'arguably within the zone of interests to be protected or regulated' by the statutes that the agencies [are] claimed to have violated.<sup>59</sup>

In attempting to satisfy this test, condominium unit owners will be benefitted by the Court's presumption in favor of reviewability.<sup>60</sup> The "injury in fact" test can be easily satisfied by the unit owners. A unit owner has a direct economic interest in both the amount of carrying charges he must pay and in insuring that the condominium has sufficient funds to meet its obligations.<sup>61</sup> Additionally, in an action under the APA, the unit owner will not be faced with the problem of satisfying a jurisdictional amount.<sup>62</sup>

More difficulty is presented by the "zone of interest" test.<sup>63</sup> In *Northwest Residents Association v. Department of HUD*,<sup>64</sup> a federal

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<sup>59</sup> *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972), quoting *Association of Data Processing Organizations v. Camp*, 397 U.S. 150, 153 (1970); see *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967); *Rusk v. Cort*, 369 U.S. 367, 379 (1962). But see *Zimmerman v. United States Government*, 422 F.2d 326, 330 (3d Cir. 1970); *Ove Gustavsson Constr. Co. v. Floete*, 278 F.2d 912, 914 (2d Cir. 1960); *Kansas City Power & Light Co. v. McKay*, 225 F.2d 924, 932-33 (D.C. Cir.), cert. denied, 350 U.S. 884 (1955); *Nuclear Data, Inc. v. Atomic Energy Comm'n*, 344 F. Supp. 719 (N.D. Ill. 1972).

The Supreme Court has yet to resolve the question of whether the APA creates an independent basis for jurisdiction. *Rusk v. Cort* is authority for the proposition that it does. H. HART & H. WECHSLER, *FEDERAL COURTS AND THE FEDERAL SYSTEM* 1161 (2d ed. 1973).

<sup>60</sup> See, e.g., *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971); *Association of Data Processing Organizations, Inc. v. Camp*, 397 U.S. 150, 157 (1970); *Barlow v. Collins*, 397 U.S. 159, 166-67 (1970); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967); *Peoples v. United States Dep't of Agriculture*, 427 F.2d 561, 564 (D.C. Cir. 1970), modified on rehearing, 427 F.2d 566 (per curiam); *Citizens Comm. v. Volpe*, 425 F.2d 97, 101-02 (2d Cir.), cert. denied, 400 U.S. 949 (1970).

<sup>61</sup> "Palpable economic injury" will serve as the basis for standing to sue under the APA, absent a specific statutory provision for judicial review. *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972).

<sup>62</sup> Since the Supreme Court has at least impliedly accepted the APA as providing an independent jurisdictional predicate, unit owners challenging HUD action do not have to rely on either federal question jurisdiction or diversity jurisdiction in order to get their claim before a federal court. See note 59 and accompanying text *supra*; 28 U.S.C. § 1331 (1970) (federal question jurisdiction); 28 U.S.C. § 1332 (1970) (diversity jurisdiction). Both sections 1331 and 1332 have a \$10,000 jurisdictional requirement.

If the unit owners seek to enforce a legal right via a diversity class action, they face severe problems in meeting the \$10,000 requirement. *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), and *Snyder v. Harris*, 394 U.S. 332 (1969), require that each member of a class independently satisfy the monetary requirement, and aggregation of claims is not permitted.

<sup>63</sup> *Northwest Residents Ass'n v. Department of HUD*, 325 F. Supp. 65, 68 (E.D. Wis. 1971).

<sup>64</sup> *Id.*

district court held that the APA, by itself, can confer jurisdiction on the court to review HUD action.<sup>65</sup> The court held that a zone of interest was created by congressional affirmation of a national goal to provide a decent home and living environment to all Americans.<sup>66</sup> It should be noted that a "zone of interest" was "arguably" created by the statute authorizing the Secretary of HUD to regulate carrying charges. There is some indication in the legislative history of the statute that one of its purposes was to afford some protection to unit owners.<sup>67</sup>

Once over the standing barrier, potential group representatives are faced with the requirements of the federal class action rule. In order to maintain a class action in federal court, the class must be so numerous that joinder is impossible, there must be common questions of fact and/or law, the claims of the representatives must be typical of those of the class, and the representative must adequately represent the class.<sup>68</sup> In addition, one of the following conditions must be present: 1) a risk of inconsistent adjudications, 2) a risk that individual adjudications would impair the ability of absent class members to obtain relief, 3) action or inaction by the adverse party on grounds generally applicable to the class, or 4) the court finds that the common issues predominate over the issues affecting individuals and the class action device is superior to other methods for achieving a fair and efficient adjudication of the dispute.<sup>69</sup>

Unit owners in moderate or large condominium projects would not have any great difficulty with these requirements. Unit owners in small condominiums may have trouble demonstrating that the class is so large as to make joinder impracticable.<sup>70</sup> The requirement that the

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<sup>65</sup> See also *Citizens Comm. v. Volpe*, 425 F.2d 97, 102 (2d Cir.) cert. denied, 400 U.S. 949 (1970); *Davis v. Humphrey*, 355 F. Supp. 29, 41 (E.D. Pa. 1973).

In *Northwest Residents Ass'n*, plaintiffs were six property owners and a nonprofit organization which represented them and "several hundred other home owners" in a section of Milwaukee. They contended that HUD was improperly approving payment of mortgage interest subsidies.

<sup>66</sup> 325 F. Supp. at 68, citing 12 U.S.C. § 1701(t) (1970); see *Davis v. Romney*, 355 F. Supp. 29, 38 (E.D. Pa. 1973).

<sup>67</sup> Under the Housing Act of 1961, which provided only for insuring individual mortgages and not blanket mortgages, the FHA Commissioner was authorized to regulate charges as is "necessary and feasible to promote and protect individual owners." S. REP. No. 281, 87th Cong., 1st Sess., in 2 U.S. CODE CONG. & AD. NEWS 1923, 1938 (1961).

For purposes of the "zone of interest" test, it is not necessary that a particular class comprise the primary beneficiaries of a particular statute. *Davis v. Romney*, 355 F. Supp. 29, 37 (E.D. Pa. 1973).

<sup>68</sup> FED. R. CIV. P. 23(a) (1973).

<sup>69</sup> *Id.* 23(b). Rule 23 also imposes exacting notice requirements which must be satisfied. *Id.* 23(c), (d).

<sup>70</sup> This "numbers" problem encountered in Federal class suits may not be as trouble-

class be numerous is flexible and a great deal of discretion is given to the trial court.<sup>71</sup> Although the number of individuals in the class is not in itself dispositive, it is a factor which must be considered.<sup>72</sup> Professor Charles Allen Wright reports that, while no strict numerical test is possible, groups of 39 or less have been deemed too small, while larger groups have been held sufficient.<sup>73</sup>

#### ACTIONS BY THE ASSOCIATION

The class action is not the only device by which condominium unit owners may attempt to assert their rights in a collective manner. An organization representing the unit owners, such as the board of managers or condominium association, may try to bring an action to enforce common rights, rather than have its members do so. The standing of the organization to maintain such actions will vary depending upon the statutes and rules of the particular jurisdiction. For instance, both New York and Connecticut provide by statute that the board of managers has standing to prosecute an action relating to the common elements or to more than one unit.<sup>74</sup>

In Florida and California, on the other hand, a condominium association does not have standing to maintain an action on behalf of its members. In a California case,<sup>75</sup> the foundation of a condominium cracked as the result of heavy rains and unstable soil conditions. The condominium association sued the builder for the cost of repairing the damage, alleging that the builder improperly cut, filled and compacted the soil. Although the association had a duty to make repairs, it was denied standing on the ground that the association could, by assessment, pass the cost through to the unit owners, the real parties in interest.<sup>76</sup>

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some in states which permit class suits based on a common interest as well as suits in which the parties are too numerous. See note 11 and accompanying text *supra*.

<sup>71</sup> *Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n*, 375 F.2d 648, 653 (4th Cir. 1967) (en banc); *Sims v. Parke Davis & Co.*, 334 F. Supp. 774, 781 (E.D. Mich.), *aff'd*, 453 F.2d 1259 (6th Cir. 1971) (per curiam), *cert. denied*, 405 U.S. 978 (1972); *Cortright v. Resor*, 325 F. Supp. 797, 807 (E.D.N.Y.), *rev'd on other grounds*, 447 F.2d 245 (2d Cir. 1971), *cert. denied*, 405 U.S. 965 (1972).

The plaintiff's allegations as to the size of his class must consist of more than speculation. *DeMarco v. Edens*, 390 F.2d 836, 845 (2d Cir. 1968); *Sims v. Parke Davis & Co.*, 334 F. Supp. 774, 781 (E.D. Mich.), *aff'd*, 453 F.2d 1259 (6th Cir. 1971) (per curiam), *cert. denied*, 405 U.S. 978 (1972).

<sup>72</sup> *Fidelis Corp. v. Litton Indus., Inc.*, 293 F. Supp. 164, 170 (S.D.N.Y. 1968).

<sup>73</sup> Wright, *Class Actions*, 47 F.R.D. 169, 172 (1969).

<sup>74</sup> See N.Y. REAL PROP. LAW § 339-dd (McKinney 1973); VIII CONN. GEN. STAT. REV. § 47-85 (1973).

<sup>75</sup> *Friendly Village Community Ass'n, Inc., No. IV v. Silva & Hill Constr. Co.*, 31 Cal. App. 3d 220, 107 Cal. Rptr. 123 (Ct. App. 1973).

<sup>76</sup> *Id.* at 225, 107 Cal. Rptr. at 126. Since all the unit owners have a common interest in repairing the damaged foundation, a class action should be maintainable against the

In Florida, a condominium association, which also had a leasehold interest in one of the units, brought an action on behalf of all of the unit owners to clear title to an adjacent swimming pool.<sup>77</sup> It was alleged that the unit owners purchased their units in reliance on the developer's misrepresentation that the pool was on the condominium's property. The court held that the leasehold interest did not give the condominium association an interest co-extensive with that of the unit owners, and noted that the Florida condominium statute did not authorize the association to maintain a class action.<sup>78</sup>

Federal courts have held that if members of an organization have been injured, the organization may represent them in a judicial proceeding.<sup>79</sup> Thus, should HUD disapprove the carrying charges set by the board of managers, the board could bring an action in federal court to review the HUD decision.<sup>80</sup>

The use of the associational form of action may serve as a valuable alternative to litigants in jurisdictions which severely limit the bringing of class actions. In states which both restrict class actions and question the capacity of the board of managers or condominium association to sue on behalf of the unit owners, legislation authorizing the representatives of the condominium to institute litigation should be made a part of the local condominium statute. A statute patterned after New York's would be an important step toward assuring that unit owners have access to the courts for the purpose of enforcing their common rights.

#### CONCLUSION

The purchaser of a condominium unit has not only obtained a place to live, but has joined a community whose members are dependent upon each other. Wrongs committed against the community will affect each unit owner. The unit owners should be permitted to

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builder. See note 11 and accompanying text *supra*. The fact that each unit owner might be entitled to recover a different amount of damages, because of variations in the assessments levied on different units, should not preclude a class action. See note 46 *supra*. In fact, a class action would obviate the need for many suits against the builder for small sums based on a single set of facts.

<sup>77</sup> *Hendler v. Rogers House Condominium, Inc.*, 234 So. 2d 128 (Fla. Dist. Ct. App. 1970).

<sup>78</sup> 234 So. 2d at 130. The condominium association alleged that its declaration gave the association the right to bring an action on behalf of the unit owners. The court rejected this contention on the ground that the declaration was not introduced into evidence. Thus, in Florida, the possibility remains that a court might uphold a declaration which gives the association the right to sue in the name of the unit owners.

<sup>79</sup> *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972); *Association of Data Processing Organizations v. Camp*, 397 U.S. 150 (1970).

<sup>80</sup> See note 64 and accompanying text *supra*. The board could argue that a failure to increase the amounts of carrying charges has injured the unit owners because, without the additional money, the board is unable to undertake necessary maintenance work.

seek judicial redress of their grievances by means of a class action. If unit owners are compelled to bring a series of individual actions, the door is open to a multiplicity of suits involving the same factual and legal issues, and cost to the state and to the litigants will be unnecessarily increased. Moreover, if relief may be obtained only on a case-by-case basis, the likelihood is that all unit owners will not sue (the anticipated expenses being greater than the anticipated recovery) and a wrongdoer may thus escape liability for his actions.

Fortunately, condominium class actions can be brought in most instances since such suits relate to a "common interest." New York courts, however, have foreclosed the use of class actions in three areas: 1) suits seeking damages for fraud and misrepresentation, 2) suits by present nonpurchasing tenants of a building slated for conversion into a condominium against the sponsor of the conversion, and 3) actions against the state Attorney General for accepting an improper plan for filing.

An essential element in a fraud action recovery is whether reliance was placed upon the misrepresentation. Since the reliance factor has inherently individual characteristics, denial of class relief in most instances is appropriate. However, in large projects, it is possible that the same fraudulent statements were relied upon in the same manner by a large number of persons. The refusal to permit a class action in this situation may prevent full vindication of the victims' rights.

The refusal to permit present tenants to challenge a conversion plan is also unfortunate. It compels these tenants to make a difficult decision. If a tenant elects to buy based on an allegedly defective plan, he may be permitting himself to be a victim of fraud. If the tenant decides not to purchase his apartment, he runs the risk of being evicted. Legislation should be adopted to remedy this situation.

Since the condominium is a recent phenomenon, the full spectrum of possible controversies has not yet been experienced.<sup>81</sup> As diverse forms of litigation arise, receptivity toward class actions should increase. Moreover, as draftsmen of bylaws become more imaginative and state legislators more responsive, the courts may come to accept even greater and more divergent class actions pertaining to condominiums.

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<sup>81</sup> Among the developments forthcoming in the condominium area is the combining of the condominium associations into a condominium union which would pursue common objectives in the legislature and conceivably in the courts. See Connolly, *More Owners of Condominiums in the Suburbs Organize*, N.Y. Times, March 17, 1974, § 8 (Real Estate) at 1.